

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20541

In the Matter of:

DISPATCH

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

NOTICE OF PROPOSED RULEMAKING

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Appendix A: Proposed Rules

I. INTRODUCTION

1. In October 1994, Congress passed and the President signed the Communications Assistance for Law Enforcement Act ("CALEA").¹ The Act was designed to respond to rapid advances in telecommunications technology and eliminate obstacles faced by law enforcement personnel in conducting electronic surveillance. For purposes of this Notice of Proposed Rulemaking ("NPRM"), "electronic surveillance" is defined as "both the interception of communications content (wiretapping) and the acquisition of call-identifying information (dialed-number information) through the use of pen register devices and through traps and traces."² While telecommunications carriers have been required since 1970 to cooperate with law enforcement personnel in conducting electronic surveillance,³ CALEA for the first time requires telecommunications carriers to modify and design their equipment, facilities, and services to ensure that authorized electronic surveillance can be performed. These modifications must be achieved by October 25, 1998.⁴ CALEA also imposes

¹ Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

² U.S. Congress, Office of Technology Assessment, Electronic Surveillance in a Digital Age, OTA-BP-ITC-149 (Washington, DC: U.S. Government Printing Office, July 1995). Pen registers capture call-identifying information for numbers dialed from the facility that is the subject of lawful interception (i.e., outgoing calls), while trap and trace devices capture call-identifying information for numbers received by the facility that is the subject of lawful interception (i.e., incoming calls). H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 26 (1994).

³ See infra paras. 2-4 for a discussion of the electronic surveillance statutes enacted before CALEA.

⁴ 47 U.S.C. § 1001 at note. But see 47 U.S.C. § 1006(c) (permitting a telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility or service prior to October 25, 1998 to petition the Commission for one or more extensions of the deadline for complying with CALEA's capability requirements). Any extension granted under Section 1006 may extend no later than October 24, 2000. 47

responsibilities on the Attorney General of the United States, equipment manufacturers, providers of telecommunications support services, standards setting bodies, and the Commission. Various amendments to Title 18 of the United States Code and the Communications Act of 1934 ("the Communications Act")⁵ were enacted as part of CALEA. In particular, new Section 229 of the Communications Act states that the Commission "shall prescribe such rules as are necessary to implement the Communications Assistance for Law Enforcement Act."⁶ This proceeding focuses on the responsibilities imposed specifically upon the Commission by CALEA. The rules that this Commission will adopt in this proceeding will affect vital law enforcement interests. As a consequence, the Federal Bureau of Investigation was consulted during the preparation of this NPRM.⁷ This NPRM proposes, and seeks comment on, rules that this Commission should adopt to implement CALEA, and requests interested parties to submit proposed rules to implement CALEA.

II. BACKGROUND

A. THE FOURTH AMENDMENT AND PRE-CALEA LEGISLATION

2. The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures.⁸ Prior to 1967, electronic surveillance was not

U.S.C. § 1006(c)(3).

⁵ 47 U.S.C. § 151 et seq.

⁶ 47 U.S.C. § 229.

⁷ In the Federal Bureau of Investigation's ("FBI's") Implementation of Section 109 of the Communications Assistance for Law Enforcement Act, Rules and Regulations, 62 FR 13307 (1997), the FBI released rules implementing reimbursement regulations. In the FBI's Second Notice of Capacity, Notice of Proposed Rulemaking, 62 FR 1902 (1997), the FBI requested comment on determining electronic surveillance capacity requirements required by Section 104 of the Communications Assistance for Law Enforcement Act (CALEA). Finally, in the FBI's Implementation of Section 109 of the Communications Assistance for Law Enforcement Act: Request for Comment on "Significant Upgrade" and "Major Modification," Advanced Notice of Proposed Rulemaking, 61 FR 58799 (1996), the FBI requested comment on the definitions of these key statutory terms.

⁸ U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

considered a search and seizure for purposes of the Fourth Amendment.⁹ In 1967, the Supreme Court held in Katz v. United States,¹⁰ that electronic surveillance constituted a search and seizure for purposes of the Fourth Amendment, and that the conversations of individuals subjected to such eavesdropping were protected by the Constitution.¹¹ In an effort to balance the interests of both privacy and law enforcement, Congress responded in 1968 by enacting the first electronic surveillance legislation ("1968 Act").¹² The 1968 Act established a judicial process by which law enforcement officials could obtain a court's authorization to conduct electronic surveillance. The 1968 Act also prohibited the use of electronic surveillance by private individuals.¹³

3. In 1970, the United States Court of Appeals for the Ninth Circuit held that the 1968 Act did not require carriers to provide technical support needed to conduct judicially approved interception of wire communications, nor did the 1968 Act give courts the authority to compel such action.¹⁴ Congress subsequently amended the 1968 Act to require carriers to "furnish the applicant [requesting electronic surveillance] forthwith all information, facilities, and technical assistance necessary to accomplish the interception."¹⁵ During 1986, Congress enacted electronic surveillance legislation that encompassed emerging services and technologies,¹⁶ such as electronic mail, cellular phones, and paging devices.¹⁷

⁹ See Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that wiretap interception of telephone conversations without trespass and without the physical seizure of any material object did not fall within the confines of the Fourth Amendment). But see id. at 478 (dissenting opinion of Justice Brandeis) ("[t]o protect that right [the right to be let alone], every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment").

¹⁰ 389 U.S. 347 (1967).

¹¹ Id. at 353 ("[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment").

¹² Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968).

¹³ See H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 11 (1994).

¹⁴ Application of the United States for Relief, 427 F.2d 639, 643-44 (9th Cir. 1970).

¹⁵ 18 U.S.C. § 2518(4).

¹⁶ Electronics Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1872 (1986). "Electronic communication" is defined as:

any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photooptical

4. Section 705 of the Communications Act¹⁸ prohibits persons assisting in receiving or assisting in transmitting radio, or interstate or foreign wire, communications from divulging or publishing "the existence, contents, substance, purport, effect, or meaning" of such communication.¹⁹ Section 705, however, contains an exception to that prohibition for disclosures authorized by Title 18 of the United States Code. As a general matter, Title 18 only authorizes providers of wire or electronic communication services to assist law enforcement officials in intercepting communications or conducting electronic surveillance in certain felony cases²⁰ when a law enforcement agency gives the service provider a court order, signed by a judge of competent jurisdiction, authorizing such interception.²¹ Providers of wire or electronic communications must assist law enforcement officials when presented with such an order.²² The unauthorized conduct of electronic surveillance is, however, a felony.²³ In

system that affects interstate or foreign commerce, but does not include -

- (A) any wire or oral communication;
- (B) any communication made through a tone-only paging device;
- (C) any communication from a tracking device (as defined in section 3117 of [Title 18]).

Id.

¹⁷ See H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 12 (1994).

¹⁸ 47 U.S.C. § 605(a).

¹⁹ It has generally been the Commission's policy to refer alleged violations of Section 705 to the Department of Justice for investigation and action. See, e.g., Inquiry into Alleged Improper Activities by Southwestern Bell, Report and Order, 82 FCC 2d 322 (1980). Divulging, for purposes of Section 705, includes transmitting a message to a third person without the consent of the sender. See United States v. Gruber, 123 F.2d 307, 309 (2d Cir. 1941).

²⁰ 18 U.S.C. § 2516(1) (enumerated offenses include murder, kidnapping, robbery, and extortion).

²¹ 18 U.S.C. § 2518. Under certain circumstances, a telecommunications carrier may assist in conducting electronic surveillance without a court order if a law enforcement official, specially designated by the appropriate prosecuting office, reasonably determines that an emergency situation exists. Such circumstances must meet the following criteria: (1) the nature of the emergency involves immediate danger of death or serious physical injury, conspiratorial activities threatening the national security, or conspiratorial activities characteristic of organized crime; (2) there are grounds that support the issuance of a court order; (3) there is not sufficient time available to obtain a court order; and (4) an application for a court order is made within 48 hours after the interception has occurred. Id. at § 2518(7).

²² 18 U.S.C. § 2518(4).

²³ 18 U.S.C. § 2511(4).

addition, persons whose communications are unlawfully intercepted, disclosed, or used may file a civil action against persons who perform unauthorized electronic surveillance to recover damages, attorneys' fees, and court costs.²⁴

B. CALEA

5. When it passed CALEA, Congress sought to balance three important policies: "(1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies."²⁵ Congress passed CALEA to preserve the ability of law enforcement officials to conduct authorized electronic surveillance in the face of the recent, rapid technological changes in telecommunications that threaten their ability to intercept communications.²⁶ Congress cited 183 cases in which new technology in telecommunications had impeded the ability of law enforcement officials to conduct electronic surveillance.²⁷ Call forwarding, three-way conferencing, voice recognition calling, digital features, and cellular services were specifically identified as making electronic surveillance difficult or impossible to conduct.²⁸

6. In addition to the proliferation of services currently offered, the increase in the sheer number of service providers further complicates efforts to conduct the authorized implementation of electronic surveillance.²⁹ While carriers have been required since 1970 to cooperate with law enforcement officials' efforts to conduct court-authorized electronic surveillance, the question of whether carriers have an affirmative obligation to design or modify their systems to accommodate such surveillance has never been adjudicated.³⁰ CALEA for the first time imposes such an affirmative obligation upon telecommunications carriers.

²⁴ 18 U.S.C. § 2520.

²⁵ H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994).

²⁶ 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde).

²⁷ Id. See also 140 Cong. Rec. H-10780 (daily ed. October 7, 1994) (statement of Rep. Edwards).

²⁸ See 140 Cong. Rec. H-10781-83 (daily ed. October 7, 1994) (statements of Rep. Fields and Rep. Oxley).

²⁹ H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 15 (1994).

³⁰ See H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994).

7. CALEA contains numerous provisions designed to protect privacy interests within the context of court-authorized electronic surveillance. For example, Section 105 requires that access to call-identifying information available at a carrier's switching premises occur only in accordance with lawful authorization and the affirmative intervention of an employee of the carrier acting in accordance with regulations prescribed by the Commission.³¹ Section 207 of CALEA also increases the requirements with which law enforcement officials must comply to obtain electronic mail and other transactional data by requiring that a court order be presented, rather than the administrative subpoena that formerly sufficed.³² In addition, Sections 202 - 204 of CALEA extend the privacy protection of existing electronic surveillance legislation to cordless phones and certain data communications transmitted by radio.³³ Section 103(a)(2)(B) of CALEA also prohibits the use of pen registers and trap and trace devices to obtain information that tracks and locates targeted subscribers; location information, however, determined from the telephone number may be used.³⁴

8. Other provisions of CALEA are designed to ensure that the legitimate needs of law enforcement officials do not unduly interfere with the technological development of the telecommunications industry. For example, Section 103 explicitly provides that law enforcement agencies or officers cannot require that telecommunications carriers' networks include "any specific equipment, facilities, services, features, or system configurations"³⁵ nor can law enforcement officials prohibit carriers from using any specific design for their networks.³⁶ In addition, Section 107 requires the Attorney General to consult with appropriate associations and standards-setting organizations, as well as telecommunications carriers, in the development of the technical standards that will ensure compliance with

³¹ 47 U.S.C. § 1004. "Call-identifying information" is defined as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2). For voice communications, call-identifying information typically includes the electronic pulses, audio tones, or signaling messages transmitted as calls are routed through the carrier's network. H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 21 (1994).

³² 18 U.S.C. § 2703.

³³ 18 U.S.C. § 2511(4).

³⁴ 47 U.S.C. § 1002(a)(2)(B).

³⁵ 47 U.S.C. § 1002(b)(1)(A).

³⁶ 47 U.S.C. § 1002(b)(1)(B).

CALEA's capability requirements.³⁷

9. CALEA assigns certain responsibilities to the Commission and permits it, at its discretion, to assume others.³⁸ In this NPRM, we propose rules to implement the Commission's assigned responsibilities that include: (1) establishing regulations for telecommunications personnel on how to administer interceptions and (2) reviewing carrier petitions requesting the Commission's determination that compliance with CALEA's electronic surveillance capability requirements is not reasonably achievable. We also consider whether, and if so, how, to implement discretionary responsibilities placed on this Commission by CALEA, that include: (1) defining who is a telecommunications carrier for purposes of CALEA; (2) establishing technical requirements or standards for compliance with CALEA's electronic surveillance capability requirements;³⁹ and (3) reviewing carrier petitions seeking extension of the October 25, 1998 compliance date for Section 103 of CALEA.

III. DISCUSSION

A. DEFINITION OF TELECOMMUNICATIONS CARRIER

1. Background

10. The Telecommunications Act of 1996⁴⁰ amended the Communications Act to provide new definitions of certain terms that are also used in CALEA. Section 102(8) of CALEA defines a "telecommunications carrier" to be "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."⁴¹ Section 3(10) of the Communications Act, as amended, defines a "common carrier" as "any person engaged as a common carrier for hire."⁴² Courts have held that the definition of a common carrier in the Communications Act is not dispositive in determining who is

³⁷ 47 U.S.C. § 1005(a)(2). See also *infra* para. 39 for a further discussion of Section 103 and the standards-setting process.

³⁸ See CALEA § 301(a), 47 U.S.C. § 229(a).

³⁹ See discussion *infra* at ¶ 40.

⁴⁰ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

⁴¹ 47 U.S.C. § 1001(8).

⁴² 47 U.S.C. § 153(10).

acting as a common carrier.⁴³ The courts have focused on the "quasi-public character implicit in the common carrier concept."⁴⁴ by holding that a common carrier is one that holds itself out to serve the public indiscriminately.⁴⁵ Absent a legal requirement to act as a common carrier, an entity is not a common carrier "if its practice is to make individualized decisions, in particular cases, where and on what terms to deal."⁴⁶ Over the last twenty years, the Commission has made determinations of what is and what is not a common carrier for purposes of the Communications Act.⁴⁷

11. Section 102(8) of CALEA defines a "telecommunications carrier" to include "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."⁴⁸ Under Section 102(8), telecommunications carrier also includes "a person or entity engaged in providing commercial mobile service."⁴⁹ Section 102(8)(B)(i) references the definition of "commercial mobile service" set forth in Section 332(d) of the Communications Act. Under Section 332(d), to be classified as a provider of commercial mobile service, an entity must offer: (1) a mobile service; (2) that is provided for profit; and (3) that makes interconnected service available to the public.⁵⁰ Interconnected service means service that is interconnected with the public switched

⁴³ Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689, 705 (1979); National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 922 (1976) ("NARUC I").

⁴⁴ NARUC I, 525 F.2d at 641.

⁴⁵ Id. at 642.

⁴⁶ Id. at 641.

⁴⁷ See, e.g., Matter of Radio Location Service, Docket No. 16106, Report and Order, 5 FCC 2d 197, 202 (1966). For judicial interpretations of the Commission's definition of common carrier, see NARUC I at 640; 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 922 (1976); National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II"); and World Communications, Inc. v. FCC, 735 F.2d 1465, 1474-5 (D.C. Cir. 1984).

⁴⁸ 47 U.S.C. § 1001(8).

⁴⁹ 47 U.S.C. § 1001(8)(B)(i).

⁵⁰ 47 U.S.C. § 332(d)(1). "A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act [Communications Act], except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person." Id. at § 332(c)(1)(A).

network.⁵¹ Private mobile service, on the other hand, is defined as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."⁵² A person engaged in private mobile service cannot be treated as a common carrier for "any purpose" under the Communications Act.⁵³ Section 20.9 of our rules defines those mobile service providers that are common carriers and are regulated as commercial mobile radio service providers.⁵⁴

12. Section 102(8) of CALEA grants the Commission some discretion in interpreting the meaning of the phrase "telecommunications carrier."⁵⁵ The definition of "telecommunications carrier" includes persons providing wire or electronic switching or transmission to the extent the Commission finds that such service is "a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]."⁵⁶ The legislative history of CALEA provides additional guidance in determining what entities should be classified as telecommunications carriers for purposes of CALEA:

The bill makes it clear that all telecommunications carriers will cooperate and assist in the interception of communications for law enforcement. The definition of "telecommunications carrier" includes such service providers as local exchange carriers, interexchange carriers, competitive access providers (CAPs), cellular carriers, providers of personal communications services (PCS), satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public.⁵⁷

⁵¹ 47 U.S.C. § 332(d)(2).

⁵² 47 U.S.C. § 332(d)(3).

⁵³ 47 U.S.C. § 332(c)(2).

⁵⁴ 47 C.F.R. § 20.9.

⁵⁵ 47 U.S.C. § 1001(8).

⁵⁶ 47 U.S.C. § 1001(8)(B)(ii).

⁵⁷ See 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde). See also H.R. Rep. 103-827, 103d Cong., 2d Sess., pt. 1, at 20 (1994).

13. Section 102(8) also permits the Commission to exclude from its requirements "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General."⁵⁸ In addition, Section 102(8) explicitly excludes from the definition of telecommunications carrier any persons or entities insofar as they provide exclusively information services. Information services specifically excluded from CALEA include information storage services, electronic publishing, and electronic messaging services.⁵⁹ We note, however, that while CALEA excludes providers of information services from the requirement that they modify their networks in accordance with regulations promulgated by the Attorney General, CALEA does not exclude providers of information services from the duty to provide law enforcement personnel with interceptions in response to a court order.⁶⁰

14. Section 601 of the 1996 Act provides, however, that the 1996 Act will have no implied effect upon existing federal, state or local law when it states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."⁶¹ No specific reference to CALEA is made in the 1996 Act. As amended by the 1996 Act, the Communications Act defines "information services" as "the offering of a capability for

⁵⁸ 47 U.S.C. § 1001(8)(C)(ii). Pursuant to 28 C.F.R. § 0.85(o), the Attorney General's implementation responsibilities under CALEA have been delegated to the Federal Bureau of Investigation ("FBI"). FBI Advanced Notice of Proposed Rulemaking, 61 Fed. Reg. 58,790 (1996).

⁵⁹ 47 U.S.C. § 1001(8)(C)(i). Under CALEA, "information services"

- (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
- (B) includes -
 - (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
 - (ii) electronic publishing; and
 - (iii) electronic messaging services; but
- (C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

Id. at § 1001(6).

⁶⁰ See 18 U.S.C. §§ 2510(12) and 2516(2). The former statute defines "electronic communications" in a manner that includes information services, and the latter statute empowers law enforcement personnel to petition and receive authorization to conduct interceptions of electronic communications.

⁶¹ 1996 Act, § 601(c).

generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."⁶² The new definition of "information services" in the Communications Act does not enumerate as many services as the definition contained in CALEA. The Communications Act's new definition specifically includes information storage services, electronic publishing, and electronic messaging services.⁶³ In addition, unlike the Communications Act, CALEA's definition of information services specifically excludes "any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network."⁶⁴ The Communications Act also provides a different definition of "telecommunications carrier," namely "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services."⁶⁵ "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁶⁶ "Telecommunications," in turn, is defined to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."⁶⁷

2. Discussion

15. Although the canons of statutory construction generally provide that a later enacted provision will govern an earlier enacted provision,⁶⁸ Section 601(c)(1) of the 1996 Act specifically provides: "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments." We therefore tentatively conclude that Section 601(c)(1) of the 1996 Act establishes that CALEA's definition of a telecommunications carrier was not

⁶² 47 U.S.C. § 153(20). See *infra* para. 20 for a discussion of the impact of the 1996 Act on CALEA's definition of information services.

⁶³ 47 U.S.C. § 1001(6)(B).

⁶⁴ 47 U.S.C. § 1001(6)(C).

⁶⁵ 47 U.S.C. § 153(44).

⁶⁶ 47 U.S.C. § 153(46).

⁶⁷ 47 U.S.C. § 153(43).

⁶⁸ *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (citing 2A C. Sands, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION, § 51.02 (4th ed. 1973)).

modified by the 1996 Act. CALEA, enacted on October 25, 1994, was already federal law by the time the 1996 Act was passed. Also, for the reasons discussed in paragraph 14, supra, we tentatively conclude that Section 601(c)(1) of the 1996 Act establishes that CALEA's definition of "information service" was not modified by the 1996 Act. We seek comment on these tentative conclusions.

16. We also tentatively conclude that all entities previously identified herein as common carriers for purposes of the Communications Act are telecommunications carriers that are subject to CALEA. Commercial mobile service providers also fall within the CALEA's definition of telecommunications carriers because the Communications Act states that they are to "be treated as common carriers for purposes of this [Communications] Act,"⁶⁹ and CALEA Section 102(8)(B)(i) specifically includes commercial mobile service providers as telecommunications carriers for purposes of CALEA.⁷⁰ In addition, cable operators and electric and other utilities may be subject to CALEA's requirements to the extent that they offer telecommunications services for hire to the public. In addition, we seek comment on a proposal to include within the definition of telecommunications carrier for purposes of CALEA, any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service.⁷¹ Finally, we tentatively conclude that providers of pay telephones are not telecommunications carriers for purposes of CALEA. We seek comment on these tentative conclusions.

17. We conclude that Congress intended the obligations of CALEA to have broad applicability, subject only to the limitations in scope explicitly contained in the statute. We propose not to adopt a specific list of carriers subject to these obligations because we expect that the types of entities subject to CALEA may change over time. We do propose, however, including in the rules that may be adopted in this proceeding the following list as examples of the types of entities that are subject to CALEA's requirements to the extent that they offer telecommunications services for hire to the public:

- local exchange carriers
- interexchange carriers
- competitive access providers
- satellite-based service providers

⁶⁹ See 47 U.S.C. § 332(c)(1)(A). See also supra para. 11 for a discussion of commercial mobile service providers.

⁷⁰ 47 U.S.C. § 1001(8)(B)(i).

⁷¹ For a discussion on what is a telecommunications carrier, see Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 1 (1996), at ¶ 992.

- providers of commercial mobile radio service as set forth in Section 20.9 of our Rules⁷²
- cable operators
- electric and other utilities⁷³
- any other providers of wireline or wireless telecommunications service for hire to the public.

We seek comment on this proposal and on whether the listing should include categories in addition to those discussed above. We recognize that new entrants have a wide variety of business plans that call for the leasing of all, or a portion, of their network facilities from other carriers. As a result, we seek comment on the extent to which resellers should be included in CALEA's definition of "telecommunications carrier."

18. Under Section 102(8)(B)(ii) of CALEA, if "any person or entity engaged in providing wire or electronic communication or switching service" is providing a replacement for a substantial portion of local exchange service, the Commission may exercise its discretion and classify it as a telecommunications carrier subject to CALEA.⁷⁴ We tentatively conclude that Congress gave the Commission this flexibility, so that in the future, the Commission may use Section 102(8)(B)(ii) of CALEA to include persons or entities that provide a replacement for local exchange service in a manner that does not fit neatly into the current definition of telecommunications carrier. At this time, without having a specific example to consider, we propose to decline to exercise the discretion granted in the statute to include within the definition of telecommunications carrier, and thus make subject to the obligations CALEA imposes on this class, specific persons or entities providing wire or electronic communication or switching service that is a replacement for a substantial portion of the local exchange service.⁷⁵ We seek comment on this proposal, and ask commenters to identify any case(s) that they believe warrant Commission action under this provision. Comments should specify the rationale and benefits of the exercise of such discretion by the Commission.

19. Under Section 102(8)(C)(ii), the Commission may also exempt by rule, after consulting with the Attorney General, specific classes or categories of telecommunications

⁷² See 47 C.F.R. § 20.9.

⁷³ Under Section 103 of the 1996 Act, *supra*, the Commission may determine that telecommunications operations of public utility holding companies are exempt from certain requirements of the Public Utility Holding Company Act of 1935 (PUHCA). See also 15 U.S.C. § 79 (Section 103 of the 1996 Act amends PUHCA by adding a new Section 33, which defines "Exempt Telecommunications Company").

⁷⁴ See 140 Cong. Rec. H-10781 (daily ed. October 7, 1994) (statement of Rep. Markey).

⁷⁵ See CALEA § 102(8)(B)(ii), 47 U.S.C. § 1001(8)(B)(ii).

carriers. If the Commission does not exercise its discretion pursuant to section 102(8)(C)(ii), to exclude specific classes or categories of carriers from the obligations of CALEA, then all specific classes or categories would be included unless the statute explicitly excludes them.⁷⁶ For example, CALEA explicitly states that the assistance capability obligations of Section 103⁷⁷ do not apply to information services or to interconnection services and facilities and, consequently, we would not consider the providers of such services to be telecommunications carriers for purposes of CALEA.⁷⁸ We request comment on whether the Commission should exercise its discretion and exclude classes or categories of carriers at this time. We also tentatively conclude that private mobile service providers are not subject to the requirements of CALEA because, pursuant to Section 332 of the Communications Act, persons engaged in private mobile service cannot be treated as a common carriers for any purpose under the Communications Act.⁷⁹ We seek comment on this tentative conclusion. Commenters that contend certain classes or categories of carriers should be excluded from the definition of telecommunications carrier should explain how excluding such entities is consistent with the intent of CALEA.

20. We tentatively conclude that providers of exclusively information services, such as electronic mail providers and on-line services providers, are excluded from CALEA's requirements and are therefore not required to modify or design their systems to comply with CALEA. We note the Judiciary Committee's intent "not to limit the definition of 'information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services.'"⁸⁰ Accordingly, we seek comment on the applicability of CALEA's requirements to information services provided by common carriers. We also note, however, that Congress anticipated that calling features such as call forwarding, call waiting, three-way calling, speed dialing, and the "call redirection portion of voice mail" would be subject to CALEA's

⁷⁶ See CALEA § 102(8)(C)(ii), 47 U.S.C. § 1001(8)(C)(ii).

⁷⁷ See *infra* para. 34 for a discussion of § 103.

⁷⁸ 47 U.S.C. § 1002(b)(2). Interconnection services and facilities are defined as "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers." *Id.* at § 1002(b)(2)(B). Such services and facilities include "ATM [automated teller machine] networks, bankcard processing networks, automated check clearinghouse networks, stock exchange trading networks, point of sale systems, and bank wire transfer, stock transfer and funds transfer systems." H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 23 (1994).

⁷⁹ 47 U.S.C. § 332(c)(1)(D)(2).

⁸⁰ H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 21 (1994).

requirements.⁸¹ Thus, we tentatively conclude that calling features associated with telephone service are classified as telecommunications services for the purposes of CALEA, and carriers offering these services are therefore required to make all necessary network modifications to comply with CALEA. We seek comment on these tentative conclusions.

B. CARRIER SECURITY POLICIES AND PROCEDURES

1. Background

21. Section 105 of CALEA requires a telecommunications carrier to enable the interception of communications content or access to call-identifying information via its switching premises.⁸² This interception, however, can be executed only with: (1) the presentation of a court order or other lawful authorization; and (2) the affirmative intervention of a carrier officer or employee.⁸³ Therefore, CALEA prohibits law enforcement agencies from remotely activating interceptions within a carrier's switching premises.⁸⁴ Under CALEA, all interceptions require the intervention and cooperation of a designated and authorized carrier officer or employee.⁸⁵ The officer or employee must act "in accordance with regulations prescribed by the Commission."⁸⁶

22. Section 229 of the Communications Act requires the Commission to prescribe rules to govern the policies telecommunications carriers adopt concerning the conduct of carrier personnel called upon to assist law enforcement officials in implementing electronic surveillance. Section 105 of CALEA requires a telecommunications carrier to ensure that its officers and employees follow those rules. Section 105 states:

A telecommunications carrier shall ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in

⁸¹ Id.

⁸² Switching premises include both central offices and mobile telephone switching offices. H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 26 (1994).

⁸³ 47 U.S.C. § 1004.

⁸⁴ H.R. Rep. No. 103-287, 103d Cong., 2d Sess., pt. 1, at 26 (1994).

⁸⁵ Id.

⁸⁶ Id.

accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.⁸⁷

23. Section 229 of the Communications Act directs the Commission to prescribe rules to implement Section 105 of CALEA. These rules shall require carriers: (1) to establish policies and procedures to assure that carrier employees have appropriate authorization to activate electronic surveillance and to prevent unauthorized surveillance (*i.e.*, carrier security policies); (2) to maintain records of both authorized and unauthorized surveillance (*i.e.*, recordkeeping requirements); and (3) to submit policies and procedures to the Commission for review (*i.e.*, Commission review).⁸⁸

24. The Attorney General delegated her authority to meet CALEA's responsibilities to the Director, Federal Bureau of Investigation ("FBI").⁸⁹ Pursuant to CALEA Sections 104 and 106, *infra*, the FBI has been meeting with federal, state and local law enforcement officials, telecommunications carriers, providers of telecommunications support services, and manufacturers of telecommunications equipment, to determine CALEA requirements and standards. The Commission consulted with the FBI, wireline carriers, wireless carriers, manufacturers and others, which shared information concerning existing carrier implementation of lawful electronic surveillance on behalf of law enforcement officials. The Commission also consulted with the FBI regarding the information content that carriers should include in their records of electronic surveillance, and the reporting requirements that this Commission should impose on telecommunications carriers. The information provided by the FBI to the Commission is reflected in the proposals set forth below.⁹⁰

2. Proposals

(a) Requirement 1 - Systems Security and Integrity

⁸⁷ 47 U.S.C. § 1005.

⁸⁸ 47 U.S.C. § 229(b). *See also* CALEA § 105, 47 U.S.C. § 1004.

⁸⁹ *See* Advanced Notice of Proposed Rulemaking, 61 Fed. Reg. 68,790 (1996); *see also* 28 C.F.R. 0.85(o), which permits the Attorney General to delegate responsibilities to the FBI Director or his or her designee. The FBI's Telecommunications Industry Liaison Unit and Telecommunications Contracts and Audits Unit are the agents charged with implementing CALEA for the FBI Director and the Attorney General.

⁹⁰ *See, e.g.*, paras. 27, and 31-33, *infra*.

(1) Carrier Security Policy

25. Section 229 directs the Commission to adopt rules to implement Section 105 of CALEA, and then to determine whether the policies and procedures established by a carrier with respect to the supervision and control of its officers and employees involved in electronic surveillance comply with the Commission's rules.⁹¹ Under the policies and procedures established by carriers, carriers' employees are required to receive "appropriate authorization"⁹² prior to assisting law enforcement officials in implementing electronic surveillance. Appropriate authorization could mean either: (1) the authority the carrier needs from a court or law enforcement officials to engage in interception activity; or (2) the authorization that a carrier's employee needs from the carrier to engage in interception activity. We tentatively conclude "appropriate authorization" in Section 229(b)(1) refers to the authorization that a carrier's employee needs from the carrier to engage in interception activity since this subsection refers to appropriate policies and procedures for supervision of the carrier's own employees. We also request comment generally on the rules the Commission should consider to implement Section 105, the meaning of appropriate authority, and the tentative conclusion.

26. We tentatively conclude that CALEA Section 105 imposes a duty upon each telecommunications carrier to ensure that only lawful interceptions will occur on its premises and that unlawful interceptions occurring on its premises are a violation of that duty. We also tentatively conclude that this duty requires each telecommunications carrier to ensure that the personnel it designates to implement and have access to interceptions will only perform those interceptions that are authorized, and that those personnel will not reveal the existence, or the content, of these interceptions to anyone other than authorized law enforcement personnel, except as required by a court of competent jurisdiction or appropriate legislative or regulatory body.⁹³ We request comment on these tentative conclusions.

27. We note that 18 U.S.C. §§ 2511 and 2520 provide criminal penalties and civil remedies, respectively, against persons who are convicted of conducting illegal electronic interceptions.⁹⁴ A required element of proof for both criminal offenses and civil actions is

⁹¹ 47 U.S.C. § 229(a)-(c).

⁹² 47 U.S.C. § 229(b)(1).

⁹³ 18 U.S.C. § 2516.

⁹⁴ 18 U.S.C. §§ 2511(1) and 2520(a).

intent.⁹⁵ either to intercept communications illegally,⁹⁶ or to use information with the knowledge that it was obtained through the use of an illegal wiretap.⁹⁷ We request comment on the extent to which the Section 105 duty described above⁹⁸ extends vicarious criminal and civil liability to a carrier if the carrier's employees are convicted of intercepting communications illegally. We also request comment on whether a Commission rule that requires carriers to report all illegal wiretapping and compromises of the confidentiality of the interception, to the Commission and/or the affected law enforcement agency or agencies, would modify or mitigate the carrier's liability under 18 U.S.C. §§ 2511 and 2520. In this context, the term "wiretapping" refers to all forms of electronic surveillance, including traps, traces, pen registers, Title III interceptions, and FISA interceptions.⁹⁹ For example, the FBI has suggested that all telecommunications carriers be required to report any violation of their security policies and procedures to the FCC and to report any "compromise of an interception concerning its existence to the FCC, and to the law enforcement agency, or agencies, affected."¹⁰⁰

(2) Legal Authority

28. Section 105 of CALEA defines appropriate authorization as a court order or other lawful authorization.¹⁰¹ Lawful authorization may be of two types: (1) a court order signed by a judge directing a telecommunications carrier to provide assistance in conducting specified electronic surveillance; or (2) a certification in writing by a designated senior law enforcement official that no court order is necessary.¹⁰² The latter authorization generally is limited to emergency situations that, in the judgment of senior law enforcement officials,

⁹⁵ U.S. v. Wuliger, 981 F.2d 1497, 1501, quoted in Williams v. Poulos, 11 F.3d 271, 284 (1st. Cir. 1993); Forsyth v. Barr, 19 F.3d 1527, 1538 (5th. Cir. 1995).

⁹⁶ 18 U.S.C. § 2511(a) and (b).

⁹⁷ 18 U.S.C. § 2511(c) and (d).

⁹⁸ See paragraph 25, supra.

⁹⁹ See notes 113 and 114, infra, for definitions of Title III and FISA, respectively.

¹⁰⁰ See Letter from Rozanne R. Worrell, Supervisory Special Agent, FBI, to Kent Nilsson, Deputy Chief of the Network Services Division, Common Carrier Bureau, FCC, dated December 17, 1996, a copy of which has been placed in the public record of this docketed proceeding.

¹⁰¹ 47 U.S.C. § 1004.

¹⁰² 18 U.S.C. § 2511(2)(a)(ii).

involve danger of death, serious physical injury, or serious criminal activity.¹⁰³

29. We tentatively conclude that appropriate legal authorization for purposes of CALEA encompasses what is required by Section 2518 of Title 18 of the United States Code.¹⁰⁴ The legislative history of CALEA contains no congressional finding that existing law is inadequate to protect citizens' privacy and security rights against improper surveillance. The FBI has stated that the interception of wire and oral communications requires law enforcement officials to observe requirements beyond those that are typical of ordinary search warrants.¹⁰⁵ For example, unlike most search warrants, applications from federal law enforcement agencies for interception authority require the authorization of a high-level United States Department of Justice official before a United States Attorney can apply for an order.¹⁰⁶ In addition, authorizations to federal law enforcement agencies to conduct electronic surveillance must issue from a district court judge, while ordinary search warrants may issue from a federal magistrate.¹⁰⁷ Finally, authorizations for electronic surveillance are limited to felony cases.¹⁰⁸ Various states have enacted criminal electronic surveillance laws,¹⁰⁹ but these

¹⁰³ See supra note 21 for a list of circumstances in which assistance in conducting electronic surveillance by a telecommunications carrier may be provided lawfully without a court order.

¹⁰⁴ 18 U.S.C. § 2518. To obtain a court order authorizing the interception of a wire, oral, or electronic communication, a law enforcement officer must submit a written application to a court of competent jurisdiction. The application must include information such as the identity of the officer making the application, a complete statement of facts supporting the application, a statement of whether other investigative procedures have been tried and failed or of why they appear reasonably unlikely to succeed or are too dangerous to attempt, and a statement of the period of time for which the interception is required. 18 U.S.C. § 2518(1). The judge may enter an ex parte order authorizing the interception upon a finding of probable cause. 18 U.S.C. § 2518(3). The order must specify such details as the name of the person, if known, whose communications are to be intercepted, the nature and location of the communications facility at which authority to intercept is granted, a description of the communication to be intercepted and the offense to which it relates, the identity of the agency authorized to intercept the communications, and the period of time during which such interception is authorized. 18 U.S.C. § 2518(4). No order authorizing interception of communications may remain in effect longer than 30 days, unless a separate application for extension is granted. 18 U.S.C. § 2518(5).

¹⁰⁵ Statement of Louis J. Freeh, Director, Federal Bureau of Investigation, before the Subcommittee on Technology and the Law of the Committee on the Judiciary, United States Senate, and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives, at 55-56 (March 18, 1994).

¹⁰⁶ 18 U.S.C. § 2516(1).

¹⁰⁷ Compare 18 U.S.C. § 2516(1) (electronic surveillance) with Fed. R. Crim. P. 41(a) (ordinary search warrants).

¹⁰⁸ See 18 U.S.C. § 2516.

laws do not grant law enforcement officials greater rights than they have under federal law. To emphasize the importance of this fundamental requirement, we propose a rule requiring carriers to state in their internal policies and procedures that carrier personnel must receive a court order or, under certain exigent circumstances, an order from a specially designated investigative or law enforcement officer, before assisting law enforcement officials in implementing electronic surveillance.¹¹⁰ In addition, we propose requiring carriers to incorporate into their policies and procedures the list of the exigent circumstances found at 18 U.S.C. § 2518(7).¹¹¹ We seek comment on these proposals.

(3) Internal Carrier Authority

30. Section 105 of CALEA, together with Section 229(b)(1) of the Communications Act, requires that carriers establish internal policies and procedures governing the conduct of officers and employees who are engaged in surveillance activity.¹¹² We propose requiring that carriers designate specific employees, officers, or both to assist law enforcement officials in implementing lawful interceptions. Except as provided below, we also propose that carriers include in their internal policies and procedures a statement that only designated employees or officers may participate in lawful interception activities. We are aware that for security reasons, carriers may prefer to restrict knowledge of lawful interception activity to specifically designated employees, so that non-designated employees would effectuate legal surveillance by performing routine work assigned to them in accordance with their job descriptions, without realizing that the work involves lawful electronic surveillance. Accordingly, we propose that non-designated employees be permitted to effectuate certain legal surveillance work, provided that they do such work unknowingly, as part of their routine work assignments. We seek comment as to whether such a procedure would be consistent with CALEA's requirements. Regarding recordkeeping, we recognize that non-designated employees frequently make routine notations to company records to account for work performed. These notations, while necessary to provide full and complete

¹⁰⁹ See, e.g., D.C. Code Ann. § 23-541 *et seq.* (1981); 18 Pa. Const. Stat. Ann. § 5701 *et seq.* (1983).

¹¹⁰ 18 U.S.C. § 2518(7).

¹¹¹ See *supra* note 21 for a discussion of these circumstances.

¹¹² 47 U.S.C. §§ 229(b)-(c), 1005; 140 Cong. Rec. H-10781 (daily ed. October 7, 1994) (Statement by Rep. Markey: "Section 105 represents a significant expansion of privacy protection for citizens everywhere. It ensures that wiretapping technology does not become so easy as to obviate the need for telephone company participation, which serves as a check against an end-run of the judicial system. The Energy and Commerce Committee found this interest so compelling, that in title III of the bill we direct the Federal Communications Commission to adopt special rules to enforce this requirement, and to have companies submit their procedures for safeguarding those rules with the Commission so that this preventive measure is subject to public notice and not diluted.").

documentation, would not be sufficient for the purposes of CALEA. As a result, we propose that designated employees create separate records containing electronic surveillance information for the purpose of guaranteeing the effective supervision of electronic surveillance work performed by non-designated employees who do not know that they are effectuating electronic surveillance. We seek comment on these proposals.

31. We propose that telecommunications carriers' internal policies and procedures require each employee and officer who will knowingly engage in an interception activity to sign an affidavit containing the following information prior to each instance of participation in a communications interception: (1) the telephone number(s) or the circuit identification number(s) involved; (2) the name of each employee and officer who effected the interception and possessed information concerning its existence, and their respective positions within the telecommunications carrier; (3) the start date and time of the interception; (4) the stop date and time of the interception; (5) type of interception (e.g., pen register, trap and trace, Title III,¹¹³ FISA);¹¹⁴ (6) a copy or description of the written authorization for the employee and officer to participate in interception activity; and (7) a statement that the employee or officer will not disclose information about the interception to any person not properly authorized by statute or court order. We seek comment on these proposals, and on whether additional items should be included in each affidavit. We also seek comment on whether we should limit the number of affidavits by requiring an affidavit to be prepared only by the employee or officer responsible for the interception activity.

(b) Requirement 2 - Recordkeeping

32. Under Section 229(b)(2), the Commission must promulgate rules requiring telecommunications carriers to maintain secure and accurate records of any communications or call-identifying information interception, whether the interception was with or without lawful authorization.¹¹⁵ In other words, carriers must keep records of all interceptions. We propose that these records include the following information: (1) the telephone number(s) and circuit identification number(s) involved; (2) the start date and time of the interception; (3) the stop date and time of the interception; (4) the identity of the law enforcement officer presenting the authorization; (5) the name of the judge or prosecuting attorney signing the authorization; (6) the type of interception (e.g., pen register, trap and trace, Title III, FISA); and (7) the

¹¹³ "Title III" is a term of art used by law enforcement officials to denote lawful electronic interception of a communication's content (*i.e.*, wiretapping). The term's historical origin is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968), codified in scattered sections of 18 U.S.C.

¹¹⁴ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 (1978).

¹¹⁵ 47 U.S.C. § 229(b)(2).

name(s) of all telecommunications carrier personnel involved in performing, supervising, and internally authorizing, the interception, and the names of those who possessed knowledge of the interception. We further propose that such records be compiled, either contemporaneously with each interception, or within 48 hours of the start of each interception. We seek comment on the advantages and disadvantages of each of these proposals. We note that Title 18 of the United States Code subjects persons engaged in unauthorized interceptions to both criminal prosecution and civil liability.¹¹⁶ We expect that the proposed record keeping rules, in conjunction with the significant liability prescribed in the statute for unauthorized interceptions, will give carrier personnel sufficient incentive to assist only authorized interceptions and will, therefore, protect users of telecommunications services against unauthorized invasions of privacy. We also seek comment on the length of time that each record should be retained within the custody of each telecommunications carrier. We note in this regard that 18 U.S.C. § 2518(8)(a) provides, at a minimum, for a ten-year retention of the intercepted communication.

33. We request comment on the nature of the information, if any, that telecommunications carriers should be required by our rules to make available to law enforcement officials upon request. Specifically, we request comment on whether our rules should require telecommunications carriers to create and maintain an official list of all personnel designated by the carriers to effectuate lawful interceptions, and whether carriers should be required to designate a senior officer or employee to serve as the point of contact for law enforcement officials. We request comment on the information that should be included on this list, and, in particular, whether it should contain each designated employee's name, personal identifying information (date and place of birth, social security number), official title, and contact telephone and pager numbers.

(c) Requirement 3 - Commission Review

34. Under Section 229(b)(3) of the Communications Act, telecommunications carriers must submit their security and recordkeeping policies to the Commission for review.¹¹⁷ The Commission is then required to review those policies to ensure that they comply with our security and recordkeeping rules.¹¹⁸ CALEA may apply initially to as many

¹¹⁶ 18 U.S.C. §§ 2511(4) and 2520(a).

¹¹⁷ 47 U.S.C. § 229(b)(3).

¹¹⁸ 47 U.S.C. § 229(c).

as 3,500 telecommunications carriers,¹¹⁹ although the 12 largest local exchange carriers deliver more than 90% of the total dialing equipment minutes each year.¹²⁰ It is conceivable that many of the small and rural telecommunications carriers subject to CALEA requirements may never be asked to conduct electronic surveillance. In considering this possibility, we question whether we should impose upon smaller carriers the requirements we impose upon larger carriers. We seek comment on ways to implement CALEA that will be consistent with Congressional intent that would also reduce CALEA compliance burdens on small carriers.¹²¹

35. Previously, the Commission has found that \$100,000,000 or more in annual operating revenues was the appropriate threshold for more detailed reporting requirements, and below \$100,000,000 in annual operating revenues for reduced regulatory scrutiny.¹²² The Commission subsequently applied an index to the revenue threshold to account for inflation.¹²³ If the record indicates that minimizing the burdens incurred by small incumbent local exchange carriers ("ILECs") in complying with CALEA is in the public interest, we propose defining "small telecommunications carriers" for ILECs in terms of the indexed revenue threshold provided in 47 C.F.R. § 32.9000, so that telecommunications carriers may determine the indexed revenue threshold annually.¹²⁴ For carriers with annual revenues from

¹¹⁹ Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Research Data, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (Dec. 1996) ("TRS Worksheet"). The 3,500 telecommunications carrier includes both wireline and wireless carriers.

¹²⁰ Monitoring Report, CC Docket No. 87-339, at Table 4.18 (May 1995).

¹²¹ See 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde).

¹²² Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), Report and Order, 2 FCC Rcd 5770 (1987) (ARMIS Order), modified on recon., Order on Reconsideration, 3 FCC Rcd 6375 (1988).

¹²³ Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications, and Anchorage Telephone Utility, Petition for Withdrawal of Cost Allocation Manual, Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 11716 (1996), at paras. 10-12. The \$100 million figure originally contained in 47 C.F.R. § 32.11, to distinguish Class A and Class B companies, was modified to include an index (GDP-CPI) that accounts for inflation. This index is periodically updated to account for inflation, and the current threshold (1996) for a Class A company is \$109 million. See Commission Adjusts its Annual Threshold to Account for Inflation For 1996 in Accordance with Section 402 of the 1996 Telecommunications Act, Public Notice, Report No. CC-97-21, DA 97-932 (May 2, 1997).

¹²⁴ 47 C.F.R. § 32.11(e) states:

"The initial classification of a company shall be determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification shall be made when the annual

telecommunications operations exceeding that threshold, we propose to require individual filings with this Commission that contain detailed statements of the policies, processes, and procedures that each carrier will use to comply with the requirements that are imposed by CALEA and by the rules that this Commission will adopt to implement CALEA. We further propose to permit any ILEC with annual operating revenues from telecommunications services of less than the threshold to elect either: (1) to file a statement describing its security policies, processes, and procedures; or (2) to certify that it observes procedures consistent with our prescribed systems security rules. Those ILECs that do not choose to certify compliance with CALEA's requirements must submit their policies and procedures to the Commission for individual review. We seek comment on whether such an approach would be consistent with the objectives of CALEA, and we invite alternative proposals that would effectively and efficiently achieve CALEA's objectives as well as comment on those proposals. Parties making such proposals should do so in their initial comments to permit other parties to respond in their reply comments.

36. We tentatively conclude that the 47 C.F.R. § 32.9000 indexed revenue threshold is a reasonable demarcation point for identifying those ILECs for which other reporting burdens should be reduced and have tentatively concluded that such a demarcation point should be used here. We seek comment on whether such a demarcation point should apply for other classifications of telecommunications common carriers such as those listed in paragraph 17, supra (e.g., cable operators, competitive access providers, CMRS, etc.). We seek comment on whether we should adopt the same threshold or a lower dollar threshold for streamlined filing requirements (e.g., as outlined above for ILECs), for those other telecommunications carriers with CALEA obligations, as well as proposals and comments as to what those requirements should be and what threshold values this Commission should adopt. Our concern, in this regard, arises from the fact that law enforcement officials must be able to receive pen register, trap and trace, and interception services, upon request, from all telecommunications carriers subject to CALEA's requirements. We note that smaller and

operating revenues show a greater or lesser classification for five consecutive years. Companies becoming subject to the jurisdiction of the Commission and not having revenue data for the five immediately preceding years shall estimate the amount of their annual revenues and adopt the scheme of accounts appropriate for the amount of such estimated revenues."

47 C.F.R. § 32.9000 states:

"Indexed revenue threshold for a given year means \$100 million, adjusted for inflation, as measured by the Department of Commerce Gross Domestic Product Chain-type Price Index (GDP-CPI), for the period from October 19, 1992 to the given year. The indexed revenue threshold for a given year shall be determined by multiplying \$100 million by the ratio of the annual value of the GDP-CPI for the given year to the estimated seasonally adjusted GDP-CPI on October 19, 1992. The indexed revenue threshold shall be rounded to the nearest \$1 million. The seasonally adjusted GDP-CPI on October 19, 1992 is determined to be 100.69."